IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.9.2006

CORAM:

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

C.M.A.Nos.3389 of 2004 and 232 of 2005

The Commissioner of Central Excise
Central Excise Commissionerate
No.1, Williams Road, Cantonment,
Tiruchirapalli-620 001. .. Appellant in both appeals

Vs

1. M/s.Dalmia Cements (B) Limited, Dalmiapuram.

2. Customs, Excise and Service Tax
Appellate Tribunal
Shastri Bhavan Annexure
No.26, Haddows Road
Chennai-600 006. .. Respondents in both appeals

PRAYER: Against the orders passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai Bench, dated 24.2.2004 and 20.2.2004 made in Final Order Nos.167 and 166 of 2004 respectively against the order of the Commissioner of Customs and Central Excise (Appeals -II) No.I, Williams Road, Tiruchirapalli - 620001 dated 20.06.2003 and 26.08.2003 in A.No.251/2002-TRY & A.No.36/2003-TRY-II respectively, against the order of the Deputy Commissioner of Central Excise, Central Excise I & II Division - Trichy dated 30.08.2002 and 06.06.2003 in C.No.V/25/30/2/2002 C.E.X ADJ and C.No.V/25/30/11/2003-CX.ADJ respectively.

For Appellants : Mr.K.Veeraraghavan, SCGSC
For Respondents: No appearance

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JUDGMENT

(Delivered by P.D.DINAKARAN,J.)

These appeals are directed against the orders of the Customs, Excise and Service Tax Appellate Tribunal, Chennai Bench, dated 24.2.2004 and 20.2.2004 made in Final Order Nos.167 and 166 of 2004 respectively, setting aside the order of the Commissioner of Customs and Central Excise (Appeals-II), Trichirapalli, who held that the first respondent is not

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eligible for Cenvat credit on the explosives inasmuch as they were used outside their factory.

2.1. The first respondent/Company, which manufactures cement, availed Cenvat Credit on explosives used in their mines situated outside the factory as follows:

(i) under Rule 57AA of the Central Excise Rules, 1944 and subsequently under the Cenvat Credit Rules, 2001 for the period from April, 2000 to September, 2001 to the extent of Rs.5,91,932/- in the case of C.M.A.No.3389 of 2004; and

(ii) under Rule 3 of the Cenvat Credit Rules, 2002 for the period from April, 2002 to September, 2002 to the extent of Rs.2,49,563/- in the case of C.M.A.No.232 of 2005.

2.2. The original authority disallowed the cenvat credit on the ground that the mines of the first respondent/ Company are situated 2 to 5 Kms. away from the factory and therefore, not part of the factory and hence, the explosives were not used as an "input" within the factory of production.

2.3. Aggrieved by the orders of the original authority dated 30.8.2002 made in Order-in-Original No.50/2002 and dated 6.6.2003 made in Order-in-Original No.72, the first respondent/Company preferred appeals before the Commissioner of Central Excise (Appeals), Tiruchirapalli, who by orders dated 20.6.2003 and 26.8.2003 made in Order-in-Appeal Nos.309 of 2003 and 398 of 2003 respectively, taking note of the definition of the term "input" as defined under Rule 2(g) of the Cenvat Credit Rules, 2002, the only exception being goods sent for job work outside the factory provided for under Rule 3 of the Cenvat Credit Rules, 2002, confirmed the order of the original authority and held that the first respondent/Company is not eligible for cenvat credit on the explosives used inasmuch as they were used outside their factory.

2.4. On further appeal by the first respondent/Company, the Customs, Excise and Service Tax Appellate Tribunal, Chennai Bench, by orders dated 24.2.2004 and 20.2.2004 made in Final Order Nos.167 and 166 of 2004 respectively, allowed the appeals holding that even though the impugned explosives were used in the mines of the first respondent/Company, which are situated 2 to 5 Kms. away from the factory, they are raw materials used for the purpose of manufacture of cement in the factory premises. Hence, these appeals raising the following substantial questions of law:

C.M.A.No.3389 of 2004:

(i) Whether the Tribunal is correct in holding that the explosives which are used outside the factory are eligible for cenvat credit

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as inputs when the definition of inputs under Rule 57AA of the Central Excise Rules, 1944 and 2(g) of CENVAT Credit Rules 2001 contains the provisions that the inputs should be used within the factory of production? and

(ii) Whether the decision of the Tribunal is in consonance with the recent decision of the Apex Court in the case of Commissioner of Central Excise v. J.K.Udaipur Udyog Ltd., reported in 2004 ILD 361?"

C.M.A.No.232 of 2005:

"Whether the Tribunal is correct in holding that the explosives which are used outside the factory are eligible for cenvat credit as inputs when the definition of inputs under Rule 2(g) of CENVAT Credit Rules 2002 contains the provisions that the inputs should be used within the factory of production?"

3. Before proceedings further, it is apposite to refer to the definition of the term "input" as provided under Rule 2(g) of the Cenvat Credit Rules, 2002:

"Rule:2. Definitions.-
(a) to (f) ...
(g) "input" means all goods, except high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not, and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production.

Explanation 1.- The high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2.- Inputs include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer."

(emphasis supplied)

4. It is true, the Apex Court in Commissioner of Central Excise v. J.K.Udaipur Udyog Ltd., 2004 (171) ELT 289 held that inputs for the purpose of claiming cenvat credit should have been used within the factory of the production and that if an article is not used within the factory it will not be an "input" and that the explosives which were not used in the factory where cement was produced do not qualify to be input for which credit could be given.

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5. But, the law laid down in Commissioner of Central Excise v. J.K.Udaipur Udyog Ltd., referred supra, is no more a good law in view of the recent decision of the Full Bench of the Apex Court in VIKRAM CEMENT v. COMMISSIONER OF CENTRAL EXCISE, INDORE, 2006 (194) ELT 3, wherein it is held that even though the explosives were used for blasting the mines to produce limestone for use in manufacture of cement/clinkers in factory situated some distance away from mines, cenvat credit on explosives could not be denied on the ground that they were not used as inputs within factory. In the said decision, the Apex Court observed as under:

> "19. In this background, the question arose in CCE v. J.K. Udaipur Udyog Ltd. (2004) 171 ELT 289, whether the explosives used for blasting purposes in the mines and which had not been used in the factory premises for production or in relation to the manufacture of cement could qualify for CENVAT credit.
>
> 20. The Court answered the question in the negative and in ELT para 9 of the judgment as reported said:
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> > "10. The schemes for MODVAT and CENVAT credits being different and in view of the definition of 'input' given in sub-rule (d) of Rule 57-AA of the Rules and the omission of a rule similar to Rule 57-J, the ratio of Jaypee Rewa Cement, (2001) 133 ELT 3, can have no application here."
>
> 21. Three reasons were given by the Court for holding that credit could be taken only on inputs received in the factory of the manufacturer of the final product. First, the Court held that the definition of input given in sub-rule (d) of Rule 57-AA was entirely different from the manner in which the said word had been expounded in the Explanation to Rule 57-A of the MODVAT Rules. We cannot agree with this reading of the Rule. As we have said, there was only a rearrangement of the several provisions of Rule 57-B in Rule 57-AA. Rule 57-AA is in fact more broadbased than Rule 57-B.
>
> 22. Second, the Court proceeded on the basis that under the CENVAT Scheme there was no provision similar to Rule 57-J of the MODVAT Scheme. As we have seen, Rule 57-J was replaced in substance by Rule 57-AB. This provision was overlooked.
>
> 23. The third reason given by the Court in J.K. Udaipur Udyog, (2004) 171 ELT 289 for holding that the CENVAT Scheme was different from the MODVAT Scheme was Rule 57-AC(1). However, that Rule is limited to inputs received in the factory of the manufacturer and does not impinge on Rule 57-AB at all.
>
> 24. The schemes of MODVAT and CENVAT credit are not therefore different and we are unable to agree with the conclusion of the Court in J.K. Udaipur Udyog, (2004) 171 ELT 289, that the decision in Jaypee Rewa Cement, (2001) 133 ELT 3 would have no application to the CENVAT Rules."

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6. In view of the law laid down by the Apex Court in VIKRAM CEMENT v. COMMISSIONER OF CENTRAL EXCISE, INDORE, referred supra, the first question of law in C.M.A.No.3389 of 2004 and the question of law in C.M.A.NO.232 of 2005 are answered in affirmative against the appellant. In view of the decision taken above, there is no necessity to answer the second question of law in C.M.A.No.3389 of 2004.

In the result, these appeals are dismissed. No costs. Consequently, C.M.P.Nos.18510 of 2004 and 1230 of 2005 are closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To:

1. The Commissioner of Customs and
Central Excise (Appeals- II)
Central Excise Commissionerate
No.1, Williams Road, Cantonment,
Tiruchirapalli-620 001.

2. The Assistant Registrar,
Customs, Excise and Service Tax Appellate Tribunal
Shastri Bhavan Annexure
No.26, Haddows Road, Chennai-600 006.

3. The Deputy Commissioner of Central Excise,
Central Excise I & II, Division - trichy

4. The Chief Commissioner of Central Excise, Chennai.

1 cc To Mr.K.Veeraraghavan, SCCG, SR.42844.

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RVL 10.10.2006

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